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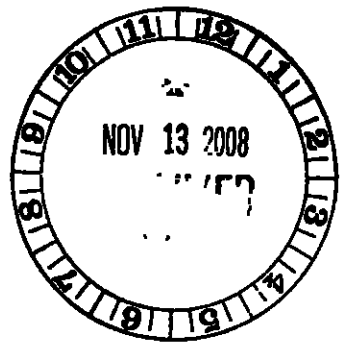


12 November 2008
by express service

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., SW
Washington, D.C. 20024

Re: South Plains Switching Ltd. Co. - Compensation for Use of Facilities in Alternative Rail Service - West Texas & Lubbock Railway Company, F.D. 35111

filing of litigation status update

Dear Madam Secretary:

Enclosed for filing please find the original and ten copies of a Notice providing information on further developments in litigation on the same issues that are before this Board in F.D. 35111. In the Notice, PYCO also responds to allegations by Mr. Larry Wisener in a Declaration annexed to the South Plains Switching reply memorandum in this proceeding filed on or about November 4, 2008. To the extent leave is required for such a filing, PYCO so requests.

Thank you for your assistance in this matter.

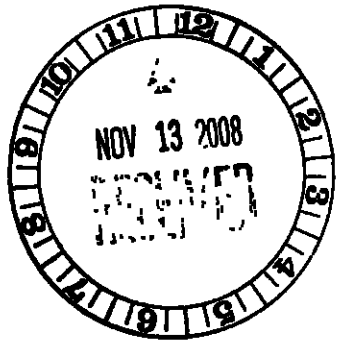
Very truly,

Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. Mr. McFarland (SAW) (w/encls)
Mr. Heffner (WTL) (w/encls)
Mr. McLaren (PYCO) (w/encls)

BEFORE THE SURFACE TRANSPORTATION BOARD



South Plains Switching Ltd. -)
Compensation for Use of)
Facilities in Alternative) F.D. 35111
Rail Service - West Texas &)
Lubbock Railway Co.)

Notice of Further Activity
in Compensation Litigation
Initiated by South Plains Switching, Ltd., LLC
and Motion for Leave to File
Comment on Wisener Declaration

I.

This is a further update on the status of pending litigation brought by South Plains Switching, Ltd., LLC ("SAW") against West Texas & Lubbock Railway ("WTL") for compensation from WTL for use of SAW lines to provide alterrative service to PYCO Industries, Inc. ("PYCO") in dockets F.D. 34802 and F.D. 34899. See South Plains Switching v. West Texas & Lubbock Railway Company, 99th District Court of Lubbock County, TX, No. 2008-544,741, filed Sept. 18, 2008.[1] This SAW lawsuit is and remains premature and preempted until and unless this Board first makes an award of compensation in this docket (F.D. 35111). Without waiver of this position, WTL and PYCO have removed the original SAW lawsuit to the United States District Court for the Northern District of

[1] Because this Board still has the issue of compensation during alternative service under submission, it is appropriate to apprise the Board of developments in related litigation.

Texas,[2] PYCO has moved to intervene, and WTL and PYCO have filed a motion to dismiss (the supportive memorandum is attached).

In its "Reply" at p. 5 filed on or about November 4 in this docket, SAW says that its "civil action" is appropriate evidently on the ground that it "is not satisfied with the conditions for use of its facilities." Those conditions were set forth in STB decisions in F.D. 34802 served Feb. 17, 2006, and F.D. 34899 served Nov. 21, 2006. Any "civil action" relating thereto is covered by the Hobbs Act, 28 U.S.C. 2341, et seq. The appeal period under the Hobbs Act (60 days) has long since lapsed. PYCO reserves the right to argue this as an additional ground for dismissal if that turns out to be the basis of SAW's claims in its state court proceeding, now removed.

As to compensation, in the absence of an agreement between the parties (SAW rejected any agreement), the amount of compensation is to be determined by this Board in the first instance (e.g., 49 U.S.C. 11102(a)[3]), and not a court. In other words, there is no compensation agreement for a court to enforce, and no compensation award for a court to order paid. SAW's reliance on section 11102(b) is misplaced. SAW needs to await an order of this Board, and in the meantime voluntarily to dismiss

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[2] South Plains Switching v. West Texas & Lubbock Railway Company, USDC N.D. TX No. 5-08CV0203-C.

[3] The referenced statute even specifies the standards which the Board is to employ.

its spurious suit.

II.

SAW annexes to its November 4 Reply a Declaration by Larry Wisener that has nothing to do with SAW's Reply, and is not cited in the Reply. In the Declaration, Mr. Wisener accuses PYCO's Robert Lacy of perjury concerning "Plainsman Switching," and further claims that Plainsman Switching, a unit of PYCO, is illegally providing rail services in Lubbock. To the extent that PYCO requires leave to respond to these spurious allegations annexed by SAW to its "Reply," PYCO so requests. PYCO's response is two-fold. First, the Wisener Declaration should be stricken as irrelevant.

Second, Mr. Wisener's claims are wrong. As to the allegation of perjury, Plainsman Switching was originally organized and operated as an unincorporated unit of PYCO. Plainsman Switching was subsequently separately incorporated, but is, and at all times was, wholly owned by PYCO. Mr. Lacy in the statement with which Mr. Wisener takes umbrage used the term "division" to cover Plainsman Switching in both its incorporated and unincorporated status (thus, no perjury). Moreover, whether Plainsman Switching was incorporated or unincorporated was irrelevant to Mr. Lacy's statement (thus, tempest in a teapot).

As to the Wisener claim that Plainsman Switching is operating illegally, PYCO is a common carrier fully authorized to

provide rail service on the former SAW system. See F.D. 34890 proceeding. PYCO initially contracted with WTL to serve as a contract carrier for PYCO to discharge PYCO's obligation. Contract carriers are not required to have separate operating authority (if they nonetheless seek such authority, a new common carrier obligation is created). PYCO has contracted with what is now a wholly owned subsidiary (Plainsman Switching) to discharge PYCO's obligation. Mr. Wisener does not contest the lawfulness of WTL's activities as contract carrier for PYCO. He neither has nor offers any grounds to suggest any illegal action by PYCO or by its unit, Plainsman Switching.[4]

PYCO hypothesizes that Mr. Wisener's angst flows from SAW's broad construction of 49 U.S.C. 10907(h). SAW has made it clear to PYCO that SAW intends to invoke a right to re-acquire any portion of the former SAW system that PYCO seeks to transfer to another entity, even if that entity is a wholly-owned subsidiary of PYCO. (SAW has specifically warned PYCO about dealings with Plainsman Switching in that regard.) While PYCO disagrees with SAW's broad construction of section 10907(h) (that construction

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[4] In separate litigation in Lubbock District Court, SAW claims that Plainsman Switching is trespassing on SAW property when its crews and trains go over switches between the BNSF mainline and the former SAW trackage. (SAW claims to own the switches, notwithstanding this Board's orders in F.D. 34890 to convey its entire system to PYCO.) SAW is seeking compensation and evidently punitive (exemplary) damages for such trespass. These additional SAW claims of illegal conduct against PYCO (through its Plainsman Switching unit) are also baseless.

limits PYCO's ability to raise capital for rail rehabilitation, and ignores PYCO's continued control), Mr. Wisener can be assured that PYCO has transferred no part of the SAW system to Plainsman Switching. Plainsman Switching is merely a unit of PYCO under contract to PYCO to discharge PYCO's common carrier obligations. 49 U.S.C. 10907(n) is not applicable.

SAW again trots out an "old saw" in its reliance on 49 C.F.R. 213.5(e) (Reply at p.4) as absolving it from any duty to maintain its track. But WTL was never "directed" to provide service over any SAW trackage within the meaning of 49 C.F.R. 213.5(e). By again referring to section 218.5(e), SAW in essence again admits it did not maintain the trackage. This underscores that WTL and PYCO again are clearly entitled to a set-off for their costs resulting from lack of maintenance against any compensation to which SAW might otherwise be entitled for WTL's use of SAW facilities to provide service to PYCO.

Respectfully submitted,

Charles H. Montange
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(206) 546-1936
for PYCO Industries, Inc.

Exhibit - Motion to dismiss SAW v. WTL, removed to U.S.D.C. N.D. TX.

Verification

I, Robert Lacy, am Senior Vice President for PYCO Industries, Inc.; I have read the foregoing "Notice of Further Activity"; and pursuant to 28 U.S.C. 1746 and penalties fro perjury, the statements therein are true and correct to the best of my knowledge, information, and belief, including specifically the clarifications about the corporate status of Plainsman Switching, a subject not relevant to my earlier statement but concerning which Mr. Wiener accused me of perjury.

Robert Lacy

Dated: November 10, 2008

Certificate of Service

I hereby certify service by deposit for express (next business day) delivery this 12th day of November 2008 upon Thomas McFarland, Esq., 208 South LaSalle St. - Suite 1890, Chicago, IL 60604-1112, counsel for SAW, and John Heffner, 1750 K Street, N.W., Suite 250, Washington, D.C. 20006, counsel for WTL.

Exhibit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SOUTH PLAINS SWITCHING, LTD. CO.	§	
	§	
V.	§	**NO. 5-08CV0203-C**
	§	
WEST TEXAS AND LUBBOCK RAILWAY COMPANY, INC.	§	

DEFENDANT WEST TEXAS AND LUBBOCK RAILWAY CO., INC. AND INTERVENOR APPLICANT PYCO INDUSTRIES, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respectfully submitted,

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INTERVENOR APPLICANT PYCO INDUSTRIES

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Regulations

Rules

Legislative History

Agency Decisions

Constitutional Amendments

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SOUTH PLAINS SWITCHING, LTD. CO.	§	
	§	
V.	§	**NO. 5-08CV0203-C**
	§	
WEST TEXAS AND LUBBOCK RAILWAY COMPANY, INC.	§	

DEFENDANT WEST TEXAS AND LUBBOCK RAILWAY CO., INC. AND INTERVENOR APPLICANT PYCO INDUSTRIES, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This Memorandum is in support of the Motion to Dismiss filed by Defendant West Texas and Lubbock Railway Company, Inc. ("WTL") and Intervenor Applicant Pyco Industries, Inc. ("PYCO"). WTL and PYCO's motion is directed at the "Petition" (state law complaint removed to this Court) filed by Plaintiff, South Plains Switching, Ltd., Co. ("SAW"). SAW's proceeding must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1); for failure to state a claim on which relief can be granted under Fed. R. Civ. P. 12(b)(6); and on the related grounds of lack of ripeness or finality, failure to exhaust administrative remedies, primary jurisdiction, and Tucker Act as discussed herein

Pursuant to the ICC Termination Act ("ICCTA"), 49 U.S C § 10101, *et seq* , the Surface Transportation Board ("STB") has exclusive jurisdiction over the issues SAW seeks to adjudicate, and is actively considering them in a pending agency proceeding. *South Plains Switching Ltd. Co* – Compensation for Use of Facilities in Alternative Rail Service – West Texas & Lubbock Railway Co., STB Finance Docket ("F.D ") 35111 *See* Appendix in Support of Motion to Dismiss ("App.") at pgs 1-12 STB jurisdiction necessitates dismissal under F.R C.P. 12(b)(1) and 12(b)(6),

underscores the lack of ripeness and finality for SAW's claim, highlights SAW's failure to exhaust administrative remedies, and establishes an impediment to SAW's action under the primary jurisdiction doctrine.

I.
BACKGROUND

For purposes of this motion only, WTL accepts *arguendo* all material facts[1] (but not legal conclusions[2]) asserted by SAW at pages 3-5 of its Petition, with the qualification that SAW fails to

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[1] SAW makes certain factual assertions which are patently incorrect, but which are not material to this motion and thus can be ignored. For example, on the fifth line from the bottom of p 4, SAW states that "eventually most of the assets of [SAW] were sold to PYCO" in the feeder line proceeding. In fact, SAW was required to sell to PYCO all the assets remaining in its possession which it received from BNSF in 1999 or thereafter In essence, PYCO purchased all of SAW

On line 11 of p. 3 of the "Petition," SAW says that it and PYCO agreed that alternative rail service could be extended for a 30 day period Instead, SAW voluntarily stated it would toll the expiration of the statutory limit on alternative service under 49 U.S C. § 11123 in order to convenience its schedule to submit responsive pleadings, and STB then extended the alternative service authorization and deadlines for various pleadings. However, this kind of error in SAW's allegations is not material to this Motion to Dismiss.

[2] For example, SAW asserts in the eighth line of p. 4 of its Petition that "S TB's failure to address [the compensation] issue was in direct contravention of the statutory requirements." This not only is an incorrect legal conclusion, but also is directly contrary to STB's decision on the matter in *South Plains Switching Ltd Co – Compensation for Use of Facilities in Alternative Rail Service – West Texas & Lubbock Railway Co* , Surface Transportation Board ("STB") Finance Docket ("F D.") 35111, slip op. at p 10, served Jan. 10, 2008. App. Exhibit "A," pgs. 1-12 SAW did not seek judicial review of this conclusion within 60 days as required under the Hobbs Act, 28 U S.C § 2341, et seq , and it is now final, it is not subject to further judicial review, and it cannot be attacked collaterally by SAW in this proceeding. *Baros v Texas Mexican Railway*, 400 F 3d 228, 237 (5th Cir. 2005) In any event, as S TB made clear in the aforementioned decision, SAW never raised the compensation issue until December 12, 2007, after the conclusion of alternative service S TB is now adjudicating the issue in its F.D. 35111 proceeding.

To take a related example, SAW purports to summarize 49 U S C. § 11102(a) at the bottom of p. 3 and top of p. 4 of its Petition, and then asserts in the seventh line at p. 4 a legal conclusion that STB erred under that statute because compensation was not "adequately secured " SAW's legal conclusion not only is incorrect but also contrary to S TB's decision in F.D. 35111, *supra*, served Jan. 10, 2008, slip op. p. 10 App. pg 10. That decision, and thus the propriety of STB's determination, cannot now be challenged here. *Baros, supra.*

mention STB's decision on January 11, 2008, establishing legal standards and a procedural schedule in F.D. 35111.

The material facts, with relevant decisions and statutes properly cited, are summarized below.

A. Alternative Rail Service

Pursuant to the ICC Termination Act (ICCTA), 49 U.S.C. § 10101, *et seq*., the Surface Transportation Board ("STB") is the federal agency which regulates freight railroads. STB's jurisdiction over such railroads is plenary and exclusive, and preemptive of all other state and federal remedies. 49 U.S.C. § 10501(b) [3]

STB under ICCTA affords a number of remedies to rail shippers (such as PYCO) faced with inadequate rail service One remedy is an order authorizing another carrier to provide temporary (some call it emergency) alternative rail service. *See* 49 U.S C. § 11123, as implemented by 49

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[3] STB is the successor agency to the Interstate Commerce Commission (ICC). In a series of early cases, the Supreme Court ruled that ICC has plenary and exclusive power over railroad regulation. *E.g*, *Colorado v United States*, 271 U.S. 153, 165-66 (1926). This result was codified in the language of old 49 U.S.C. § 10501(d) of the now repealed Revised Interstate Commerce Act. ICC railroad regulation completely preempted state economic regulation of railroads. *e g*, *Deford v Soo Line Railroad Co.*, 867 F.2d 1080 (8th Cir 1988), including state common law relating to compensation for rail services. *See G. & T. Terminal Packaging v Consolidated Rail Corp*, 830 F 2d 1230, 1234-36 (3d. Cir. 1987), cert. denied, 485 U.S. 988 (1988).

49 U.S.C. § 10501(b) confirms that power in the case of STB. The Conference Report on Section 10501(b) underscores Congress' intent to establish an "exclusive Federal standard, in order to assure uniform administration of regulatory standards ...." H R. Report 104-422, 104th Cong., 1st Sess. (Conference Report on ICCTA of 1995), p 167. Section 10501(b) states that the

> "jurisdiction of the [Surface Transportation] Board over (1) transportation by rail carriers, and the remedies provided in this part ... is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive *and preempt the remedies provided under Federal or State law*." (emphasis added.)

Subsequent cases confirm STB exclusivity and preemption. *E g*, *City of Auburn v US Government*, 154 F.3d 1025 (9th Cir. 1998) (preemption of state and local requirements); *Cedarapids v. Central, C. & P RR*, 265 F. Supp. 2d 1005, 1011-13 (N.D. Iowa 2003) (complete preemption).

C.F R. Part 1146. The duration of this remedy by statute is no more than 270 days. 49 U S C § 11123(c)(1). A second remedy (which takes longer to obtain, but which also can continue indefinitely) is interim alternative rail service. *See* 49 U.S.C §§ 10705(a) and 11102(a), as implemented by 49 C F R. Part 1147. A third remedy is a "feeder line application" pursuant to 49 U.S.C § 10907. Under Section 10907, an entity (e.g., a shipper like PYCO or a shortline railroad) can request that STB establish terms and conditions for mandatory sale of a "feeder line" to the applicant. A feeder line application thus is a kind of eminent domain proceeding. PYCO invoked all those remedies (in addition to some other remedies[4]) against SAW in various proceedings before the STB

Faced with inadequate rail service by its then local rail switch provider (SAW), PYCO in December 2005 initiated a proceeding before the STB under 49 U.S.C § 11123 (part of ICC TA) and 49 C.F R Part 1146 (STB's implementing regulation for Section 11123) to obtain alternative rail service from West Texas & Lubbock Railway Co (WTL) over the lines of SAW in Lubbock. STB authorized WTL to provide such service by a Decision in *PYCO Industries, Inc. – Alternative Rail Service -- South Plains Switching, Ltd. Co.*, F.D. 34802, served Jan. 26, 2006.[5] *See* App. Exhibit

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[4] PYCO filed a proceeding to revoke the acquisition exemption that SAW employed to acquire the relevant lines from BNSF in 1999. PYCO also filed an administrative Complaint. Ancillary to several of these proceedings, PYCO sought partial revocation of certain commodity exemptions from rail regulation for various cottonseed products Because none of these proceedings appear material here, WTL and PYCO will not address them further.

[5] The agency issued a series of orders extending Section 11123 alternative service authority to its maximum duration, and protecting PYCO from retaliatory actions by SAW during the course of the proceedings. WTL and PYCO do not believe these decisions and matters are material to this motion to dismiss and will not further discuss them. All STB decisions in F D 34802 (and all other proceedings involving WTL, PYCO, and SAW) are available at the STB website, e-library, decisions, at http.//www.stb.dot.gov/decisions/readingroom nsf/dailyreleases.

"B,", pgs 13-26.

Realizing that alternative service under 49 U.S C. § 11123 was only temporary in nature and that a more permanent solution to service inadequacy was necessary, PYCO filed a feeder line application against SAW to acquire all SAW's lines on terms and conditions set by the STB pursuant to 49 U.S.C. § 10907. This proceeding was initially docketed as STB F.D. 34844, but, after initial rejection by STB for incompleteness, the agency accepted it as resubmitted and docketed it as F.D. 34890.

When it became apparent that STB would not be able to act on PYCO's feeder line application before expiration of the statutory time limits on alternative service pursuant to 49 U S.C § 11123, PYCO on July 3, 2006, filed a proceeding for alternative rail service from WTL over lines of SAW pursuant to 49 U.S.C. §§ 10705(a) and 11102(a), and 49 C.F.R. Part 1147 STB authorized that service pursuant to Section 11102(a) by Decision served November 21, 2006, in *PYCO Industries, Inc – Alternative Rail Service – South Plains Switching, Ltd Co*, F.D. 34889. *See* Appendix, Exhibit "C," pgs. 22-27.

While PYCO's feeder line application was pending, Keokuk Junction Railway Company (KJRY) (a shortline railroad unrelated to PYCO) also filed a feeder line application to take over the SAW lines. STB ultimately authorized sale of SAW pursuant to both feeder line applications. *See PYCO Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd Co*, F D. 34890, decision served August 31, 2007, App. Exhibit "D," pgs 28-65 STB allowed SAW to choose whether it would deal with PYCO or KJRY SAW elected to sell to PYCO Pursuant to terms and conditions set by STB in the F.D. 34890 proceeding, PYCO acquired all of SAW on November 9, 2007.

In sum, pursuant to STB orders in F.D. 34802 and F.D. 34889, PYCO received alternative rail service from WTL over lines of SAW commencing at 11:59 p.m. on January 26, 2006 That service continued until closing of PYCO's purchase of SAW on November 9, 2007

B. Compensation

Both the alternative service statutes involved here (i e , 49 U.S C § 11123(b) and 49 U.S.C § 11102(a)) anticipate that rail carriers will first attempt to negotiate compensation for use of the incumbent railroad's facilities by the alternative rail supplier. However, if the railroads cannot agree, both statutes indicate that one or the other must ask STB to establish the compensation terms for them.

In its Petition at the bottom of p. 4, SAW acknowledges that it did not request STB to establish compensation "for PYCO's use of its rail lines during the .. alternative rail service" until December 12, 2007 This acknowledgment by SAW is correct [6]

At the beginning of this "Background" section, WTL and PYCO indicated that they could accept as true for purposes of this motion all material factual allegations in SAW's Petition with one qualification. In the last sentence on p. 4 of SAW's Petition, SAW asserts that "STB, as of the date

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[6] While SAW does not mention this, and while it is not material for resolution of this Motion To Dismiss, SAW in fact demanded compensation from WTL far in excess of STB precedent at an early stage of alternative service under 49 U.S.C. § 11123. On March 13, 2006, WTL offered compensation at a level consistent with STB's methodology for determining compensation, but SAW basically refused to negotiate. *See* WTL and PYCO "Reply to South Plains Switching Ltd.'s 'Petition for Compensation'," filed in F.D. 34802, 34889, and 35111, under cover letter dated Jan. 3, 2008, at pp.8-9 and associated exhibits (available to review at STB website, e-library, filings, http.//www.stb.dot.gov/decisions/readingroom nsf/dailyreleases However, as SAW's Petition appears to acknowledge, SAW never requested STB to establish terms of compensation under 49 U S C. § 11123(b) (or § 11102(a) for that matter) Moreover, SAW did not subsequently seek any negotiations with WTL and PYCO on the matter *See* WTL and PYCO "Reply," *supra*, p. 9. As SAW admits in its Petition, SAW did not request STB to determine compensation until December of 2007, after alternative service had ended.

of the filing of this petition, has not made any ruling on the compensation request of [SAW] " It is certainly true that STB has not yet determined if any amount of compensation is due SAW, or the amount of said compensation. If that is all that SAW means, then WTL and PYCO accept that meaning as true. However, to say that STB has not made "any ruling" at all on SAW's compensation request is misleading at best, because STB in fact has made a ruling, which is indisputable and concerning which this Court may properly take judicial notice. In particular, STB served a decision on January 11, 2008, in *South Plains Switching Ltd Co. – Compensation for Use of Facilities in Alternative Rail Service – West Texas & Lubbock Railway Co* , F.D. 35111. App. Exhibit "A, pgs.1-12. That decision clearly is a ruling on the compensation request: the agency indicated that was conducting a proceeding:[7] the agency established a procedural schedule for evidentiary submissions; and the agency directed the parties to submit evidence responsive to the criteria for compensation set forth in the agency's precedential decision in *Dardanelle & Russellville RR Co. – Trackage Rights Compensation – Arkansas Midland Railroad Co.*, F D. 32625, served June 3, 1996. App Exhibit "E," pgs 66-72.

Although not material to this motion, it is worth noting as background that PYCO and WTL submitted evidence in the STB proceeding that demonstrated that under the applicable *Dardanelle* criteria, the maximum compensation that may be due SAW is no greater than $45,116.32 [8] Against

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[7] When SAW initially filed its petition with STB to determine compensation on December 12, 2007, WTL and PYCO opposed the petition on the ground that SAW had failed to negotiate, sat on its rights, and had waived any right to compensation. WTL and PYCO "Reply," supra, in F D. 34802, 34889, and 35111, under cover letter of January 3, 2008. STB rejected this position, and stated it was going to determine compensation anyway

[8] "Opening Memorandum for West Texas & Lubbock Railway Co , and PYCO Industries, Inc.," in F D 35111, filed under cover letter of February 8, 2008 (available at STB website, e-library, filings), at p. 5 & 9. (The calculation is based on unchallenged rail valuations adopted by the

this, however, WTL and PYCO presented evidence showing that they were entitled to set-off's exceeding that amount [9] For example, WTL sustained three costly derailment on trackage which SAW was supposed to maintain, and supplied evidence that the derailments resulted from SAW's failure properly to maintain the trackage.[10]

Again, although not material to this motion, in the agency proceeding SAW agreed to accept the $45,116 32 figure as the amount of compensation pursuant to *Dardanelle*. However, SAW contested the set-off's *See* SAW, Reply to Opening Memorandum, e-filed under cover letter dated Feb. 25, in F.D. 35111, at p. 1 (available at STB website, e-library, filings, http://www stb.dot gov/ decisions/readingroom.nsf/dailyreleases. By letter dated August 12, 2008 (available at STB website, e-library, filings), SAW purported to withdraw its concession on the ground that STB was taking too long in issuing its decision. However, SAW nowhere provided any evidence for any other figure under the *Dardanelle* criteria for compensation, and the time taken by STB to issue a decision is not grounds to reopen the evidentiary record or the pleadings in any event.

In short, as SAW alleges in its Petition at p 4, SAW has requested STB to rule on the same issues that it now seeks to present to this Court, but before STB has issued its final ruling. As shown below, these indisputable facts are fatal to SAW's cause of action.

STB in its feeder line decision served August 31, 2007, in F.D. 34890, http://www.stb.dot gov/ decisions/readingroom.nsf/dailyreleases)

[9] *See id* at 9

[10] *See* WTL & PYCO "Reply," *supra*, under cover letter of Jan. 3, 2008, in F.D 34802, 34889, and 35111, at p. 19 and especially Exhibits "A" and "E" herein, App. pgs 1-12, 66-72.

II.
MOTION TO DISMISS STANDARD

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. *See* Fed R. Civ. Proc. 12(b)(1) Lack of subject matter jurisdiction may be found in any one of three instances, through "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981); *see also Barrera-Montenegro v United States*, 74 F.3d 657, 659 (5th Cir. 1996).

There are two ways to use a Rule 12(b)(1) motion to attack a complaint or cross-claim: a "facial attack" and a "factual attack." *See 1995 Venture I, Inc v Orange County, Tex*, 947 F Supp. 271, 276 (E D Tex. 1996). A facial attack requires the court merely to decide if the plaintiff has correctly alleged a basis for subject matter jurisdiction *See id* at 276 n.7. A facial attack is valid if from the face of the pleadings, the court can determine it lacks subject matter jurisdiction *See id* at 276. For the purposes of the motion, the allegations in the complaint are taken as true *Saraw Partnership v United States*, 67 F 3d 567, 569 (5th Cir 1995)

By contrast, if the defendant had challenged the facts that formed the basis for the plaintiff's claim of subject matter jurisdiction, the attack would be factual and the court would therefore treat the motion differently. *See 1995 Venture I, Inc.*, 947 F. Supp at 276. A factual attack challenges the existence of subject matter jurisdiction by looking beyond the pleadings *See McDaniel v United States*, 899 F. Supp 305, 307 (E.D. Tex 1995), *aff'd*, 102 F.3d 551 (5th Cir. 1996) In

reviewing a factual attack the court may consider matters outside the pleadings, such as testimony and affidavits. *See id.*

Factual and facial attacks under Rule 12(b)(1) may occur at any stage of the proceedings. *Menchaca v Chrysler Credit Corp*, 613 F.2d 507, 511 (5th Cir. 1980). The plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *See id* A party may claim that subject matter jurisdiction is lacking by virtue of the plaintiff's inability to prove the elements of the federal cause of action in question. *O'Quinn v. Manuel*, 773 F.2d 605, 607 (5th Cir. 1985). To determine whether a federal question is involved requires the court to consider whether the complaint states a claim "arising under" federal law *See id*

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *See McDaniel*, 899 F Supp at 307 When a Rule 12(b)(1) motion is filed with a Rule 12(b)(6) motion, the court should consider the jurisdictional attack before addressing the attack on the merits. *Hitt v City of Pasadena*, 561 F 2d 606, 608 (5th Cir 1977) (per curiam) This requirement prevents a court without jurisdiction from dismissing a case with prejudice *See id* The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination on the merits and does not prevent the plaintiff from pursuing a claim in a court that does have subject matter jurisdiction. *See id*

Under Federal Rule of Civil Procedure 12(b)(6), motions to dismiss raise the defense of failure to state a claim upon which relief may be granted. Fed. R. Civ. Proc. 12(b)(6). This motion is appropriate when the defendant or counter-plaintiff attacks the complaint because it fails to state a legally cognizable claim. *See id* In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based

upon those facts." *Tel-Phonic Servs., Inc v TBS Int'l, Inc*, 975 F.2d 1134, 1137 (5th Cir. 1992) (quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966))

While this defense is often asserted before the first responsive pleadings of the defendant, it is not waived if it is not filed in the answer or pre-answer stage. Fed. R. Civ. P 12(h)(2). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court in *Conley v Gibson*:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v Gibson, 355 U.S. 41, 45-46 (1959), *see also Grisham v United States*, 103 F.3d 24, 25-26 (5th Cir. 1997).

The *Conley* test "is a rigorous standard, but subsumed within it is the requirement that the plaintiff state its case with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged." *Elliott v Foufas*, 867 F.2d 877, 880 (5th Cir 1989)

In a Rule 12(b)(6) motion to dismiss, the allegations of the complaint must be taken as true *See Grisham*, 103 F.3d at 25. Further, the allegations in the complaint should be construed favorably to the pleader. *See Oppenheimer v. Prudential Securities, Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This requirement is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *See Hitt v City of Pasadena*, 561 F.2d at 608.

III.
ARGUMENT

For purposes of a motion under Fed. R .Civ P. 12(b)(1), this Court need not treat the allegations in SAW's Petition as true, but may consider undisputed facts outside the Petition, or

disputed facts as resolved by this Court.[11] However, for purposes of a motion under Fed R. Civ P 12(b)(6), factual allegations (but not claims about the law) are treated as true.[12]

Congress has expressly provided that STB jurisdiction under ICCTA is "exclusive" and preempts all other federal and state remedies. 49 U.S.C. § 10501(b) [13] As the Fifth Circuit has said,

> "The language of [this] statute could not be more precise, and it is beyond peradventure that regulation of ... train operations .. is under the exclusive jurisdiction of the STB unless some other provision in ICCTA provides otherwise. The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity of operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm."

Friberg v Kansas City Southern Rwy Co , 267 F.3d 439, 443 (5th Cir. 2001) (footnotes omitted) PYCO invoked two STB ICCTA remedies, both clearly involving rail "operations" and in the "economic realm," and which under Section 10501(b) (and *Friberg*) are "exclusive" and preemptive. These two STB statutory remedies are 49 U.S C § 11123 (alternative rail service in situations requiring immediate action to serve the public) and 49 U.S.C § 11102 (use of terminal facilities). SAW's Petition (complaint) at p. 5 (e.g , lines 7 and 12) clearly seeks a judicial award of "damages" in the form of "compensation" for use of its facilities during alternative service under these two STB statutory remedies. But under ICCTA, what SAW's Petition seeks is STB's job to do, not a court's.

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[11] *See Williamson v Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

[12] *E.g , Kansa Reinsurance v Congressional Mortgage Co* , 20 F.3d 1362, 1366 (5th Cir 1994).

[13] The Fifth Circuit in *Baros v Texas Mexican Railway Co.*, 400 F.3d 228 (2005) indicated that STB had exclusive jurisdiction until an unconditional abandonment authorization of the rail property by the agency. Here, of course, there has been no abandonment For further discussion of STB exclusive jurisdiction, see note 5, *supra*

SAW's Petition thus fails on jurisdictional grounds (Fed. R Civ .P.12(b)(1)), and also fails to state a claim on which any court can grant relief (Fed. R. Civ. P. 12(b)(6)).

A. Only STB Has Jurisdiction to Determine "Damages"

1. The ICCTA Remedies Are Exclusive and Preemptive

Under 49 U.S C. § 11123(b)(2), rail carriers may negotiate "the terms of compensation" but if they do not agree, then "the Board may establish the terms for them." Under 49 U.S.C § 11102(a), the rail carriers also may negotiate the question of "compensation for use of the [terminal] facilities." The statute goes on to say that if they do not agree, "the Board may establish conditions and compensation for the use of the facilities under the principle controlling compensation in condemnation proceedings." *Id*

In short, both the relevant ICCTA statutes not only provide a remedy for PYCO, but also cover the compensation issue that SAW seeks to raise In the case of the latter, Congress expressly provided that STB has power to establish compensation terms in the absence of carrier agreement. Neither 49 U.S.C. § 11123 nor 11102(a) authorizes some other forum to do so. Under 49 U S.C. § 10501(b), STB's jurisdiction is exclusive, and other remedies are expressly preempted. *A fortiori* if SAW wants compensation for alternative service, and is unwilling to negotiate with WTL and PYCO, it must first obtain an STB compensation award [14]

[14] This is not a case in which STB is denying a remedy. As the agency's January 11, 2008 decision in F.D. 35111 makes clear, the agency is affording the statutory remedy. App. Exhibit "A," pgs. 1-12.

2. SAW's Action Must Be Dismissed under Rule 12(b)(1)

Since SAW is necessarily seeking to have this Court determine compensation ("damages") for alternative use of SAW facilities in the first instance, dismissal is required under Fed. R. Civ P 12(b)(1).

The burden of proof to show jurisdiction in the context of a Rule 12(b)(1) motion is upon the plaintiff (here, SAW). *See South Plains Switching, Ltd Co v STB*, No. 5.07-CV-047-C (N D. Tex Sept. 25, 2007), slip op. at 4, *appeal dismissed as moot*, 271 Fed. Appx. 465, 2008 U.S. App. LEXIS 6524 (5th Cir. Mar. 28, 2008 (unpublished) (Appendix, Exhibit "F", pgs. 73-82, at pg. 76) [15]

SAW cannot carry this burden STB jurisdiction is exclusive and preemptive under 49 U.S.C. § 10501(b) STB is specifically charged by the underlying substantive statutes (49 U S.C. §§ 11123 and 11102) to establish compensation if the parties cannot reach an agreement. Moreover, here the agency is actively doing so. Given that the agency's authority is exclusive, any claim for this Court (or any other court) to establish compensation must be dismissed for lack of jurisdiction. Fed. R. Civ. P. 12(b)(1). *E.g., Baros v Texas Mexican Railway*, 400 F 3d 228, 237 (5th Cir. 2005) (STB exclusive jurisdiction), *Cedarapids, supra.* Indeed, this Court has already articulated this result in another case involving this set of rail lines and SAW. SAW evidently sued STB in 2007 in this Court in order, among other things, to vacate the November 21, 2007 order authorizing alternative service for PYCO in F D. 34889 (App. Exhibit "C," pgs. 22-27) and to enjoin STB from enforcing it. This Court granted STB's motion to dismiss for lack of jurisdiction (Fed R Civ. P. 12(b)(1)). This Court explained that it would have jurisdiction over an STB order only "for the

[15] This Court's ruling is, or course, in accordance with the general rule as to burden of proof on jurisdiction in Rule 12(b)(1) motions. *See Cedarapids, supra*, 265 F. Supp. 2d at 1015

payment of money" or only "arising out of a referral " *South Plains Switching, Ltd Co v STB*, slip op. at 6 (App. Exhibit "F," App. pg. 78). There has been no STB order for the payment of money (and of course there has been no referral). Accordingly, the action must be dismissed under Fed. R Civ P 12(b)(1).[16]

3. This Court Also Lacks Jurisdiction to Review Any of the STB Decisions at Issue

SAW may not obtain judicial review of any of STB's various decisions -- including STB's January 11, 2008, decision in F.D. 35111 – here. The validity of STB's decisions, including those in F.D. 35111, are only reviewable, if at all, by a court of appeals pursuant to the Hobbs Act. It may not be collaterally attacked elsewhere, including here. *Baros, supra*, 400 F.3d at 237; *King County v Rasmussen*, 299 F.3d 1077, 1089 (9th Cir 2002) (district court cannot hear claims that have practical effect of seeking review of an ICC or STB order). This Court confirmed this point in *South Plains Switching, Ltd. Co , supra*, slip. at 5-6, App pgs. 77-78. To the extent SAW's Petition complains about what STB had done, it must be dismissed for lack of jurisdiction under Fed. R. Civ. P 12(b)(1)

B. Dismissal Is Also Required under Rule 12(b)(6)

Since only STB has power to determine the amount of compensation for alternative service, and since — as SAW admits at the bottom of p 4 of its Petition — STB has not yet made a compensation determination, SAW's Petition simply fails to state a claim on which relief can be granted. SAW cannot maintain any "civil action" to collect any "damages" because STB has not

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[16] This Court of course has federal question jurisdiction for purposes of removal based, inter alia, on the doctrine of complete preemption. *See Deford, supra*, 867 F.2d at 1084-85 & 1089 (finding complete preemption for purposes of federal jurisdiction for claims relating to ICC exclusive jurisdiction); *Cedarapids, supra* (same for STB exclusive jurisdiction). *See also Baros* (upholding dismissal of removed case).

determined any yet Under the statutes, SAW's claim for damages (compensation) for alternative service must first be addressed to, and resolved by, STB.

Once STB makes a compensation determination, any party in that proceeding may seek judicial review, but only in a relevant court of appeals pursuant to the Hobbs Act, 42 U S.C. § 4321, *et seq*. *See Baros, supra*, 400 F.3d at 237 (5th Cir. 2005) ("[p]ursuant to the Hobbs Act, the courts of appeal have exclusive jurisdiction over any action to enjoin, suspend, or determine the validity of an STB order") *See also South Plains Switching, Ltd Co. v. STB, supra*, slip op at 6, App. pg 78 (Hobbs Act is "exclusive means of jurisdictional review" of STB orders).

Alternatively, if STB finds that WTL (or in reality PYCO, since PYCO has pledged to cover this sort of cost) owes compensation to SAW, and if WTL (in reality PYCO) fails to pay pursuant to the STB order, then SAW may have a "civil action"[17] remedy to enforce the STB order in U S District Court. *See South Plains Switching, Ltd Co v STB, supra*, slip op. at p. 6 ("district court

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[17] SAW's Petition at p. 5 (fifth line from top, and fourth line from bottom) claims it can employ a "civil action" to sue WTL for damages (including compensation) for alternative use. The term "civil action" appears to derive from 49 U S.C. § 11102(b).

There were two kinds of alternative service involved before the agency: 49 U.S C. § 11123, and 49 U.S.C. § 11102.

49 U.S C. § 11123 (the kind of alternative service at issue in F D 34802) does not provide for any "civil action" remedy

49 U.S.C. § 11102(b) (the kind of alternative service at issue in F.D. 34889) anticipates a "civil action" remedy only under two conditions: if the incumbent carrier "is not satisfied with the conditions for use" or "if the amount of compensation is not paid promptly."

STB established the conditions of use in F.D. 34889 in its decision at *PYCO Industries, Inc – Alternative Rail Service – South Plains Switching, Ltd Co* , F.D. 34889, served November 21, 2006 (Appendix Ex. "C," pg. 22-27) The only path for judicial review of a STB decision like this is pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq* Under that statute, review must be sought within 60 days of the STB decision and then only in a court of appeals. SAW never filed such a civil action. *It cannot now bring an action in this court to review the terms of use*

STB has not yet established "the amount of compensation," so there is no "civil action" remedy under 49 U.S.C §11102(b) to compel payment yet

only has jurisdiction over STB orders in civil actions for the 'payment of money'") (App. Exhibit "F," pg 78)

In short, at this time, there is no STB order for the payment of money for this Court to enforce SAW's "civil action" accordingly does not state a claim; it is premature It must be dismissed per Fed. R. Civ. P. 12(b)(6).

C. *SAW Fails to Exhaust Administrative Remedies, Alleges a Case that Is Not Ripe, and Seeks Review of an Administrative Process Not Yet Final*

This case should also be dismissed under the doctrines of exhaustion, ripeness, finality, and "primary jurisdiction." The two ICCTA alternative service statutes at issue here (namely, Sections 11123 and 11102) both assign to STB responsibility to resolve disputes concerning compensation in the first instance. That federal agency has special expertise in valuing rail property, and in determining compensation for use of that property. It exercises that expertise not only in the administration of the alternative use statutes, but also through the various condemnation (eminent domain) provisions of ICCTA which the agency administers (*e g* , the feeder line statute, 49 U.S.C. § 10907, and the "offer of financial assistance" statute, 49 U.S.C. § 10904). The agency has developed a unified body of law governing valuation of rail property. Here, STB is actively conducting a proceeding (namely, F.D 35111) to determine compensation pursuant to its standards. All that has happened is that STB has not yet issued a decision that awards compensation In seeking "damages" (i.e., compensation) in this court action, SAW has jumped the gun. Its claim for damages in court is not ripe (STB has not yet established an amount to be recovered); SAW has failed to exhaust its administrative remedies (STB has not yet ruled on a final amount); and the agency action required as an antecedent to a court enforcement action is not yet final (the agency has not yet

completed its proceeding) SAW's lawsuit should therefore be dismissed for lack of ripeness, failure to exhaust administrative remedies, and lack of final agency decision on which to base a judicial action. Fed. R. Civ. P. 12(b)(6)

D. SAW's Action Is Barred by the Doctrine of Primary Jurisdiction

Alternatively, under the doctrine of primary jurisdiction, this Court should defer to the adjudicatory processes of the agency with expertise, STB. The primary jurisdiction doctrine originated with the Supreme Court's decision in *Texas & Pacific Railway Co v Abilene Cotton Co*, 204 U S. 426 (1907). That case held that the reasonableness of a railroad's rates are within the primary jurisdiction of STB's predecessor agency, the old Interstate Commerce Commission (ICC). The Court held that the ICC alone was empowered in the first instance to hear claims about rate reasonableness. The Court relied on the need for uniform rules to govern such issues 204 U S. at 441 & 446. *See also United States v Western Pac RR Co*, 352 U.S 59 (1959) (error not to refer question of appropriate compensation level to agency). *Compare Friberg, supra*, 267 F.3d at 443 (referencing congressional intent to provide uniform regulation). In abolishing ICC but establishing STB in its place, Congress has made even more clear the pervasive, plenary, and exclusive nature of STB jurisdiction. *See* 49 U.S.C § 10501(b). In the matter at issue here, STB seeks to apply a uniform standard (the *Dardanelle* criteria) to determine compensation for alternative service. Decision in F D. 35111, served Jan. 11, 2008, App Exhibit "A," pgs. 1-12 This Court should defer to the agency's primary jurisdiction and expertise as the Supreme Court has long suggested SAW's action should be dismissed under Fed. R. Civ. P. 12(b)(6)

E. SAW Fails to Allege a Valid Takings Claim

WTL did not enter the SAW premises per a contract with SAW, but under the authority of STB orders obtained by PYCO in the two STB alternative use proceedings (F.D. 34802 and 34889). Analytically, SAW's claim therefore is a claim for damages over and beyond whatever compensation (if any) STB awards in F.D 35111. But this amounts to a claim for a "taking" of SAW property (through use by WTL) pursuant to STB orders. Such a claim either is an impermissible collateral attack on STB jurisdiction and orders, or is for "just compensation" (U.S. Const. amend V) for a regulatory "taking" of property. If a collateral attack, only the courts of appeals have jurisdiction per the Hobbs Act *See Dave v Rails to Trails Conservancy*, 79 F.3d 940, 943 (9th Cir. 1996), *citing Assure Competitive Transportation, Inc. v United States*, 629 F 2d 467, 472 (7th Cir. 1980) If for a "taking," then it arises by reason of STB regulation, in which event the Tucker Act, 28 U S C. § 1491(a)(1), provides the remedy. SAW must bring an action in Claims Court against the United States (not WTL), as is the case for all other takings claims for use of rail property arising due to federal rail regulation. *E g . Dave, supra*, 79 F.3d at 943, citing *Preseault v ICC*, 494 U.S 1, 17 (1990) In short, to the extent SAW is alleging a taking, its action either is jurisdictionally barred as an impermissible collateral attack on STB orders, or fails to state a claim (or jurisdiction) against WTL (or PYCO) due to the Tucker Act remedy. In either case, dismissal is required. *Dave, supra* (affirming dismissal).

IV
CONCLUSION

For the reasons stated, SAW's Petition fails on jurisdictional grounds, and for similar reasons fails to state a claim on which relief may be granted It conflicts with STB exclusive jurisdiction, is not ripe, fails under doctrines of exhaustion and finality, and is contrary to STB's primary jurisdiction. If a claim for a taking, it either impermissively collaterally attacks STB orders, or it must be dismissed in light of the Tucker Act In all events, dismissal is appropriate under F R C.P. 12(b)(1) & (6)

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2008, I filed the foregoing document with the clerk of the court for the U S. District Court, Northern District of Texas. The electronic filing system sent a "Notice of Electronic Filing" to the following defendants, all of whom have not yet consented in writing to accept this Notice as service of this document by electronic means.

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